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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THOMAS B. ANDERSON, Plaintiff, -against - SOTHEBY'S, INC. SEVERANCE PLAN, *et al.*, Defendants.	Case No. 04cv08180 (SAS) ELECTRONICALLY FILED **PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

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Plaintiff Thomas B. Anderson, through counsel, respectfully submits this memorandum of law in support of his motion for summary judgment on all his claims against the Sotheby's, Inc. Severance Plan (the "Plan"), the Administrator of the Plan (the "Administrator"), and Sotheby's Holdings, Inc. ("Sotheby's"). In this case, Mr. Anderson seeks severance benefits and equitable relief under the Employment Retirement Income Security Act of 1974, as amended, ("ERISA") (Counts I-II) and the substantial unpaid wages he earned for the period January 1 through February 17, 2004 (Counts III-V).

I. INTRODUCTION

Mr. Anderson was fired by Sotheby's after almost twenty-three years of service when it sold its subsidiary, Sotheby's International Realty, Inc. ("SIR") to Cendant Corp. ("Cendant") on February 17, 2004. At SIR, Mr. Anderson had spent his career building his reputation as a leading professional in the sale of luxury residential properties and the promotion of SIR's exclusive marketing services to owners of luxury properties in SIR's Tri-State and Mid-Atlantic regions. After the sale, Cendant placed him in its "Real Estate Franchise Group." Mr. Anderson was told he would be responsible for convincing the independent brokerages that had been affiliated with SIR within his two regions to become Cendant franchises. There is no evidence, however, that Mr. Anderson had ever negotiated or reviewed a franchise agreement in his entire career.

Likewise, he was told that he would no longer be compensated as he had been at SIR (which had consistently generated total cash compensation of over $800,000). Instead, his compensation package was, in large part, according to Cendant, "to be defined," or "to be established." It was clear, however, that the compensation proposal guaranteed far less than he had earned at SIR and would decrease over time. More important, it had little or no relation to Mr. Anderson's profession – the marketing and sale of luxury properties.

The Plan provides that participants are entitled to severance following an involuntary termination due to "the sale or elimination of [SIR]." The only exception to severance following a sale occurs if the buyer "continues to employ Employee and Employee's job responsibilities and compensation are comparable to [his] job responsibilities and compensation with the company prior to the sale." In no way was the opportunity to persuade independent brokerages to become Cendant franchises comparable to Mr. Anderson's long career selling luxury real estate. Likewise, even the guaranteed portions of the compensation proposal fell short of his well-established SIR cash compensation package.

The Administrator, nevertheless, denied Mr. Anderson's request for severance on July 16, 2004, and denied his appeal on September 20, 2004, claiming Cendant had, on some undisclosed date prior to March 31, 2004, offered him a specific job with responsibilities and compensation comparable to his position at SIR. In doing so, the Administrator withheld from him relevant information it had compiled regarding his claim (despite his repeated requests for it); expressly refused to consider information that he provided and issues he raised; and personally interviewed parties who had promised to assist in the "defense" of the claim, without giving Mr. Anderson the same opportunity. Moreover, a review of the "record" that the Administrator compiled contains no substantial evidence, and in some respects, no evidence at all, to support its conclusions that Mr. Anderson's career selling luxury real estate and exclusive marketing services to owners of luxury real estate was "comparable" to a specific job offered by Cendant that involved persuading independent real estate brokerages to become Cendant franchises. To the contrary, critical evidence in that record that supports Mr. Anderson's position is omitted altogether from the denials of his claim and his appeal – and, indeed, was withheld from him until this Court ordered its disclosure after this case was filed.

There is more. Although it is undisputed that Mr. Anderson's regions earned substantial income from his personal efforts through the date he was fired, Sotheby's has refused to pay him his compensation for those efforts to this day.

As fully set forth below and in accompanying Local Rule 56.1 Statement of Undisputed Material Facts ("St."), Mr. Anderson is entitled to both his severance benefits and his wages.

II. ARGUMENT

A. The Standard of Review.

Summary judgment should be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). To defeat summary judgment, the non-moving party may not rely on conclusory allegations but must "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

This Court has held that an arbitrary and capricious standard applies to its review of the Administrator's denial of Mr. Anderson's severance claim. *Anderson v. Sotheby's, Inc. Severance Plan*, 04 Civ. 8180 (SAS), 2005 U.S. Dist. LEXIS 23517, at *18 (S.D.N.Y. Oct. 11, 2005). Under that standard, the Court may overturn an administrator's decision to deny benefits "if it [was] without reason, unsupported by substantial evidence, or erroneous as a matter of law." *Zervos v. Verizon N.Y., Inc.*, 277 F.3d 635, 650 (2d Cir. 2002) (reversing district court and ordering award of requested benefits under arbitrary and a capricious standard) (internal quotation marks omitted). In addition, procedural "[v]iolation[s] of ERISA and its implementing regulations ha[ve] been held to constitute 'a significant error on a question of law,' and may 'sufficiently taint [the fiduciary's] denial of [benefits] so as to warrant a finding that [the denial] was arbitrary and capricious.'" *Cook v. N.Y. Times Co. Group Long Term Disability Plan*, 02

Civ. 9154 (GEL), 2004 U.S. Dist. Lexis 1259, at *21-22 (S.D.N.Y. Jan. 30, 2004) (citing *Vieulleux v. Atochem N. Am., Inc.*, 929 F.2d 74, 76 (2d Cir. 1991) and collecting other cases) (brackets in original and added).

B. The Administrator's Denial of Benefits Was Not Supported by Substantial Evidence.

The Court may, "[u]pon review of the record," determine that a denial of benefits is arbitrary and capricious based upon the lack of substantive evidence. *See Courter v. First Unum Life Ins. Co.*, No. 04-5975, 2005 U.S. App. LEXIS 27395, at *3-4 (2d Cir. Dec. 14, 2005) (reversing district court judgment in favor of plan administrator and holding that, based upon the evidence in the record, the Administrator's denial of benefits to claimant was arbitrary and capricious). If the denial was "unsupported by substantial evidence," it should be reversed. *See Miller v. United Welfare Fund*, 72 F.3d 1066, 1027 (2d Cir. 1995) (finding that administrator's "[r]eliance on such limited information to deny the claim was arbitrary and capricious since it was not 'based on a consideration of the relevant factors.' Moreover, even if Byrne had explained in detail the contents of the administrative record – Blake's letter, the nursing notes, and Aetna's claim analysis and denial – each item either buttressed [claimant's] position or was neutral.") (internal citation omitted).

1. The Administrator lacked substantial evidence that the position Cendant offered Mr. Anderson (to the extent one was offered at all) had comparable job responsibilities.

The Administrator stated in its July 16, 2004 denial and the September 20, 2004 denial of the appeal (the "Appeal Denial") that it had considered Mr. Anderson's Declaration (with attachments); his correspondence (with attachments) dated March 17, May 10, June 28, and June 29, 2004; correspondence from Cendant dated March 29, May 28, and June 9, 2004; the Plan document, and the Summary Plan description. St. at ¶¶ 48, 61. The "administrative record" also includes skeletal minutes of the Administrator's meetings, providing minimal content about what the Administrator considered. St. at ¶ 55. In addition, although the July 16, 2004 denial relies heavily on interviews with three Cendant employees, the "administrative record" produced on December 22, 2004, contains no detail of those interviews, despite repeated written requests by Mr. Anderson that it be produced. St. at ¶¶ 53, 56, 59, 63.[1] Likewise, although the Appeal Denial refers to those interviews and notes that representatives of Cendant "were asked to review" the July 16, 2004 letter and Mr. Anderson's appeal, there is no evidence in the administrative record of the content of any response by Cendant to that purported review.

The Appeal Denial states that the Administrator "considered only the specific, defined position offered to Mr. Anderson by Cendant in assessing the comparability of the job responsibilities and compensation." St. at ¶ 61. No evidence in the record, however, supports that Cendant offered Mr. Anderson a "specific, defined position." To the contrary, Mr. Anderson's sworn declaration states that no specific proposal (other than the general plan to secure franchises) was made. St. at ¶ 26. Mr. Good apparently told the Administrator that "the sequence of events as described by Mr. Anderson are genuinely accurate as far as when meetings took place, *and the specific proposals*" (emphasis added). St. at ¶ 41. This concession, of course, does not appear in either the July 16, 2004 letter or Appeal Denial. Indeed, the notes of the interviews with the Cendant personnel contain no reference to an occasion on which Mr. Anderson was extended a specific, defined offer. In addition, the Administrator knew that Cendant was unable to define the specifics of Mr. Anderson's role:

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[1] As set forth below in Section C1, the Administrator only produced the notes of interviews with Cendant personnel on May 17, 2005 by order of this Court, despite Mr. Anderson's repeated requests for them during the administration of his claim. The

Footnote continued on next page

> At the time [Mr. Good] made the offer to Mr. Anderson, it was very early in Cendant's process for having been able to think through those specifics, and it became clear to me in asking questions of Mr. Good in July that during the time he was having conversations with Mr. Anderson in March, that there were lots of generic ideas and good intentions that could not at that time have been crystallized by Mr. Good or Mr. Anderson for specifics of that kind. I think they were both hamstrung by having these conversations very early in the inception of the model for how this would all work.

St. at ¶ 35.

Moreover, Cendant's two written responses (May 28 and June 9, 2004) to the Administrator's request for a "full account of the particulars of the [job] offer [to Mr. Anderson]" did not describe a specific job offer, except with a curious reference to an "offer letter," which Cendant later admitted did not exist. St. at ¶¶ 31-32. To the contrary, Cendant conceded, in writing, that it made a verbal offer "many of which terms and conditions, Mr. Anderson described in his [May 10, 2004] claim for benefits." St. at ¶ 32. In those letters, Cendant identified no additional "terms and conditions," offered to Mr. Anderson. Further, Cendant admitted that as of March 29, 2004 (*after* Mr. Anderson had claimed severance benefits), there was no specific job offer, stating that as of that date, Mr. Anderson's "current duties and responsibilities are under negotiation" and were expected to change "to accommodate the Cendant/NRT franchise model in the future." St. at ¶ 17. Most significantly, there is no evidence in the record that the Administrator inquired at all about any of these documented statements, nor are any of them addressed *at all* in the July 16, 2004 denial or the Appeal Denial.

Footnote continued from previous page

Administrator's refusal to provide this relevant material to Mr. Anderson provides an independent basis to find its decision was arbitrary and capricious.

Nonetheless, the Appeal Denial identified two "specific, defined responsibilities" supposedly offered to Mr. Anderson by Cendant on some unidentified date: (1) "converting existing affiliates to franchises," and (2) "ongoing affiliate management and administration." *Id.*[2] Even assuming that those specific duties had in fact been offered to Mr. Anderson, however, the Administrator's determination that those two duties were comparable to his duties at SIR was unsupported by substantial evidence.

Mr. Anderson's duties at SIR consisted of three primary components:

> (i) managing and directing SIR's successful relationships with its twenty-tree independent brokerages in [his] regions; (ii) working closely with these independent brokerages in promoting Sotheby's marketing services, for an additional fee per property, to potential sellers of high-end residences; and (iii) personally performing realtor services for buyers and sellers of the highest priced residences in my affiliates' markers and on behalf of SIR's Greenwich brokerage within my regions.

St. at ¶ 26. Of those three duties, the duty most "central to [Mr. Anderson's] professional identity" was "selling exclusive luxury real estate." *Id.*

The Administrator's interview with Mr. Siegel, Mr. Anderson's supervisor and the President of SIR, confirmed that:

- "Anderson's job prior to 2/17 was for the most part, generally as he described in his submission."
- "Anderson did not spend much of his time doing what he would call 'affiliate management.'"
- "His involvement with the affiliate was mostly on a property specific basis. In other words he would become involved marketing specific properties – what the listing price should be, what kind of ad to purchase, how to market THIS property."

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[2] Sotheby's use of the term "ongoing" conflicts directly with the administrative record because it is undisputed Cendant planned to terminate all affiliate relationships by December 2005, at the latest. St. at ¶ 41.

- "Anderson chose to focus his involvement on property specific advice."
- "Anderson did a large amount of [obtaining listings], and would have done the listing presentations (along with the affiliate) for many of the listings in his regions inventory."
- "[T]raditional selling efforts. . . this was the bulk of Anderson's efforts."

St. at ¶ 39. According to the July 16 and September 20, 2004 letters, Mr. Anderson's prior primary role of "traditional selling efforts" and "property specific advice" are entirely absent from the two specific duties offered by Cendant. This alone defeats "comparability."

In addition, the Administrator found that, with respect to the converted franchisees, Mr. Anderson's responsibilities would be comparable to his "responsibilities in managing and assisting the affiliates in his region prior to February 17, 2004." St. at ¶ 61. The evidence before the Administrator, however, did not support its finding of comparable duties. There is no evidence whatsoever that Mr. Anderson had ever negotiated or even seen a franchise agreement during his long career at SIR. Moreover, Mr. Siegel explained that "affiliate management" was a minor aspect of Mr. Anderson's duties, as Mr. Anderson "did not spend much of his time doing" that, the number of affiliates "was small," and the affiliates "had long contracts." St. at ¶ 39. Indeed, Mr. Siegel himself apparently told the Administrator that he did the contract negotiations for the affiliates in Mr. Anderson's regions. *Id.* Thus, the evidence did not support the Administrator's contention that, because one component of Mr. Anderson's duties at SIR had included "negotiating … affiliates' contracts," his principal franchise conversion duties at Cendant were "comparable" to his principal SIR duties.

There is also no record that the Administrator had any evidence to contradict Mr. Anderson's sworn statement that Mr. Siegel told him in February 2004 his role going forward would be "dramatically different." St. at ¶ 26. Likewise, there is no evidence to contradict Mr. Anderson's sworn statement that Mr. Good told him on February 26, 2004, that "the role going forward in franchise operation would be a change for him" and that his job "as it exists is converting to franchise sales." *Id*. The Administrator did not address or inquire about these Cendant admissions in concluding that Cendant had offered Mr. Anderson a "comparable" job.[3]

The Administrator's denial of Mr. Anderson's claim was not only unsupported by the substantial evidence in the record but was in fact *contradicted by* the substantial evidence. For this reason alone, the Administrator's denial should be reversed as arbitrary and capricious.

2. The Administrator lacked substantial evidence that Cendant offered Mr. Anderson comparable compensation.

The Plan entitles Mr. Anderson to severance if he was not offered comparable compensation by Cendant. The Administrator's determination that Mr. Anderson's Cendant compensation would be comparable to the over $800,000 in annual cash compensation he had consistently earned at SIR is contradicted by the record.

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[3] In a strikingly similar case that Mr. Anderson provided to the Administrator for its consideration prior to the initial denial of his claim, the Seventh Circuit held that an Administrator's denial of severance benefits "defie[d] all common sense" and was "downright unreasonable." *Dabertin v. HCR Manor Care, Inc.*, 373 F.3d 822, 828 (7th Cir. 2004) (affirming district court's ruling that denial of severance was arbitrary and capricious). St. at ¶ 33. In *Dabertin*, the claimant was a vice president of operations at Manor Care, Inc., a nation-wide nursing home company. Manor Care was acquired by and merged into HCR Manor Care, Inc. ("HCR"), which imposed a new operational plan. All vice presidents of operations had certain authority and responsibilities taken away so that they could assume the additional role of general managers. One month after the merger, Ms. Dabertin resigned and claimed severance under the company's ERISA severance plan. HCR denied her claim for benefits, reasoning that "if Dabertin had lost any duties, responsibility, authority, etc., she had gained far more and was not entitled, therefore, to severance benefits under the plan." HCR specifically emphasized that Ms. Dabertin would have enhanced opportunities due to the fact that it was twice the size of Manor Care. The district court rejected that reasoning, holding that substituting new duties did not make up for the loss of the old and ruling that HCR's denial of benefits was arbitrary and capricious. The Seventh Circuit affirmed. Similarly, here, Cendant's substitution of franchise conversion responsibilities for Mr. Anderson's prior property-specific realtor services duties does not render his new position comparable to his SIR position.

As a preliminary matter, Mr. Anderson provided the Administrator both his contemporaneous hand notes of the March 16, 2004 meeting at which Mr. Good described the Cendant compensation proposal and six lengthy paragraphs of his sworn declaration, which included a description of that meeting and the contents of the proposal. St. at ¶ 23. Mr. Anderson explained that Mr. Good stated that multiple aspects of the compensation package "needed to be defined," or were "to be established." St. at ¶ 29. Moreover, the compensation proposal was designed to decrease over time. *Id.* The record contains no evidence *at all* of any explanation by Cendant of its proposal, much less a contradiction of Mr. Anderson's sworn description of the March 16, 2004 meeting and compensation proposal. St. at ¶ 37.

Second, the Administrator's assertions about Mr. Anderson's level of potential earnings at Cendant were based on assumptions without an evidentiary basis. For example, the compensation proposal includes, in its first two years, discretionary bonuses and bonuses contingent on the percentage of independent brokerages that Mr. Anderson converted to franchises. St. at ¶ 29. Mr. Anderson's potential compensation under the proposal ranged from $450,000 to $760,000 in his first year at Cendant, with similar variance in the second year of employment. The Chair of the Committee serving as the Administrator testified that the Administrator "didn't have a highly defined understanding of [Cendant's] compensation system," but that, nonetheless, the Administrator "included in its calculation [of Mr. Anderson's compensation at Cendant] … the incentive bonus for franchise conversions" and simply "assumed" that Mr. Anderson "would be in the higher range of performance." St. at ¶¶ 36, 38.[4] Similarly, she confirmed that the Administrator "learned [from Mr. Good] that there was no written plan for the sales incentive bonus described in the compensation proposal." *Id.* She also confirmed that "as of March 16, neither Mr. Good nor Mr. Anderson could evaluate how large of a sales incentive bonus he'd get for affiliate conversions because no one knew how many [affiliates] would convert in 2004, for example." *Id.*

Not surprisingly, the record contains no indication whatsoever from Cendant, written or otherwise, of any basis for predicting the likely conversion rate for affiliates. On the other hand, the record contains Mr. Anderson's sworn statements that the independent brokerages affiliated with SIR in his regions had indicated to him that they would not convert. St. at ¶ 26. Faced with this record, the Administrator's willingness to simply "assume" that Mr. Anderson would earn the higher amounts renders arbitrary and capricious its determination that his proposed Cendant compensation was "comparable" to his compensation levels at SIR.

Third, in deeming the Cendant proposal "comparable," the Administrator arbitrarily selected the singular, unmatched high water mark in the five-year compensation plan under which – *if* Mr. Anderson (an at-will employee) remained employed at Cendant on December 31, 2005 – a one-time retention bonus of $800,000 would raise his guaranteed compensation over the preceding two-year period to an amount in excess of his most recent two-year earnings at

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[4] In reviewing denials under the arbitrary and capricious standard, courts in the Second Circuit look to testimony about the procedures followed by and the record before plan administrators. *See, e.g., Zervos v. Verizon N.Y., Inc.*, 277 F.3d 635, 647 (2d Cir. 2002) (reviewing Plan denial under arbitrary and capricious standard and "limit[ing]. . . review of. . . [the Administrator's] decision to the administrative record as it is described by the testimony of. . . [the individual who made coverage decisions] and by the minutes of the. . . [subcommittee to which such decisions could be delegated]. This record includes the written submissions. . . [to the Administrator].")

SIR. St. at ¶ 61. The Administrator offered no rationale whatsoever for selecting the December 31, 2005 date as the comparison point for compensation *and* no evidence that Cendant would have continued to employ Mr. Anderson for the full two years. As the Court has noted in an earlier ruling in this case, "speculation regarding Anderson's tenure at Cendant is just that – speculation and nothing more." *Anderson v. Sotheby's, Inc. Severance Plan*, 04 Civ. 8180 (SAS (DFE), 2005 U.S. Dist. LEXIS 11816, at *10 n.2 (S.D.N.Y. June 13, 2005).

The Administrator ignored, however, that if Mr. Anderson was terminated or left Cendant during at any point prior to December 31, 2005 (within two years after the Cendant purchase of SIR), his guaranteed compensation under the proposal would be approximately half of his accustomed earnings at SIR. St. at ¶ 29. The Administrator also ignored that his total earnings under the five-year proposal, even including the retention bonus and all possible contingent and discretionary bonuses, fell short of his SIR cash compensation by approximately $500,000 and reduced over time. *Id*. Given that the Plan requires comparable compensation, the lack of evidence to support the Administrator's determination renders the decision arbitrary and capricious.

C. Procedural Flaws in the Administration of the Claim Render the Denial Arbitrary and Capricious.

The Administrator failed to afford Mr. Anderson the required full and fair review and to follow ERISA's implementing regulations. For these reasons, the Court should hold that the Administrator's determination was so procedurally flawed to be arbitrary and capricious. *See Cook*, 2004 U.S. Dist. Lexis 1259, at *57 (granting summary judgment for claimant and denying summary judgment to defendant Plan on grounds Administrator's denial was arbitrary and capricious because it failed to conform to the procedural requirements of ERISA.)

1. The Administrator failed (in fact refused) to provide Mr. Anderson a full and fair review of his denied claim.

ERISA requires that "the appropriate named fiduciary" provide a "full and fair review" of denied claims. 29 U.S.C. § 1133(2). The Second Circuit has held that the purpose of a full and fair review is to "provide claimants with enough information to prepare adequately for further administrative review or an appeal to the federal courts." *Juliano v. HMO of N.J., Inc.*, 221 F.3d 279, 287 (2d Cir. 2000). A full and fair review "means 'knowing what evidence the decision-maker relied upon, having an opportunity to address the accuracy and reliability of the evidence, and having the decision-maker consider the evidence presented by both parties prior to reaching and rendering his decision.'" *Winkler v. Metro. Life Ins. Co.*, 03 Civ. 9656 (SAS), 2005 U.S. Dist. LEXIS 6738, at *25 n.87 (S.D.N.Y. April 18, 2005) (citation omitted).

The "most widely accepted criteria for determining what constitutes a full and fair review under ERISA were set out by the Third Circuit in *Grossmuller v. Int'l Union, United Automobile Aerospace & Agricultural Implement Workers of America*, 715 F.2d 853 (3d Cir. 1983)," cited with approval in *Crocco v. Xerox Corp.*, 956 F. Supp. 129, 138 (D. Conn. 1997), *aff'd, in part* 137 F.3d 105, 108 (2d Cir. 1998) (affirming "the district court's judgment that [the fiduciary] did not provide a 'full and fair review'" for "substantially the reasons stated by the district court"). Those criteria are:

> *The plan's fiduciary must consider any and all pertinent information reasonably available to him. The decision must be supported by substantial evidence.* The fiduciary must notify the participant promptly, in writing and in language likely to be understood by laymen, that the claim has been denied with the specific reasons therefor. The fiduciary must also inform the participant of what evidence he relied upon *and provide him with an opportunity to examine that evidence* and to submit written comments or rebuttal documentary evidence. *If the fiduciary allows third parties to appear personally, the same privilege must be extended to the participant.*

Id. at 139 (citing *Grossmuller*, 715 F.3d at 857-58) (emphasis added). *See also Connell v. Gaurdian Life Ins. Co. Severance Plan*, 02 Civ. 7522 (JSM), 2003 U.S. Dist. LEXIS 10628, at *6-7 (S.D.N.Y. June 24, 2003) (*citing* the *Grossmuller* standards and denying defendant's motion to dismiss).

In at least four respects, the Administrator failed to meet these standards. First, as noted above, the denial was not supported by substantial evidence.

Second, the Administrator refused to provide Mr. Anderson with the notes of the interviews with the Cendant employees on which it based its initial determination on July 16, 2004, and the Appeal Denial. As this Court has noted in an earlier ruling in this action, "after an initial adverse determination, it is the Plan's duty to provide the claimant with all relevant documentation. On appeal, it becomes the Plan Administrator's duty to do the same." May 31, 2005 Opinion and Order, 04 Civ. 8180 (SAS) (DFE), 2005 U.S. Dist. LEXIS 10647, at *8 (S.D.N.Y. May 31, 2005). Moreover, the Plan's claim's procedure itself expressly states, "[y]ou and your representative can review the documents that relate to your claim. . . ." St. at ¶ 20. By withholding the interview notes from Mr. Anderson, the Administrator impermissibly deprived Mr. Anderson of the specific evidence which led the Administrator to credit the Cendant executives' accounts over his and to find his claim deficient. *See Cook*, 2004 U.S. Dist. Lexis 1259, at *36 (holding that the Administrator "was *not* entitled to fail to provide [claimant] with information on why the evidence she had submitted was found deficient in the first place" and reversing denial of benefits because procedural flaws rendered denial arbitrary and capricious) (emphasis in original).

The Administrator had no legitimate basis to ignore its "duty" and withhold this pertinent information from Mr. Anderson. On July 20, 2004, Mr. Anderson specifically requested the notes of the interviews with the Cendant employees, because Sotheby's had apparently relied on them in denying his claims. St. at ¶ 53. On August 20, 2004, the Administrator promised to provide the "notes of interviews of Cendant employees" in response to Mr. Anderson's written request for documents relevant to the denial of his claim. St. at ¶ 54. When the Administrator then failed to do so, Mr. Anderson wrote repeatedly asking for the interview notes, even explaining why they were not privileged. St. at ¶¶ 56, 59. The Administrator refused. St. at ¶ 63.[5]

This failure demonstrably prejudiced Mr. Anderson. The notes contain material that corroborates Mr. Anderson's assertions. St. at ¶¶ 39-43. Mr. Anderson was, therefore, unable to point the Administrator to the portions that clearly supported his position (which were omitted from both denial letters) or provide "rebuttal" evidence relating to the statements of the Cendant witnesses. Moreover, the Administrator did not even examine the notes of the interviews with Cendant employees to ensure that their purported basis for rejecting Mr. Anderson's account of events was accurate, but relied on an oral report of which there is no record. St. at ¶ 46. The Second Circuit has found that this failure renders a denial arbitrary and capricious. *Miller*, 72 F.3d at 1072 ("[i]n reviewing the denial of Potok's claim, the subcommittee did not actually examine the nursing notes; rather, it relied on the summary provided by Byrne").

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[5] In an earlier decision in this case, Magistrate Judge Eaton observed that the Administrator "offered no explanation for the change of heart," after August 20, 2004. *Anderson v. Sotheby's Inc. Severance Plan*, 04 Civ. 8180 (SAS) (DFE), 2005 U.S. Dist. LEXIS 9033 at **7-8 (S.D.N.Y. May 13, 2005). He held that the Administrator had no valid work-product protection claim to the interview notes, as they were "created in the ordinary course of assessing an employee's beneficiary's claim for a large severance benefit," and ordered that the notes be produced to Mr. Anderson. *Id.* at *23.

In addition, in the Appeal Denial, the Administrator rejected Mr. Anderson's sworn statement in the Declaration that he and other Regional Managers were told by Cendant executives on February 19, 2004, that, *inter alia*, they "were to begin with selling franchises to SIR's existing affiliates and to develop additional broker franchises in new markets." St. at ¶ 29. Instead, the Administrator credited contrary statements of the Cendant employees it had interviewed. The Administrator deemed Mr. Anderson's new responsibilities comparable to his old responsibilities because the Administrator was "told independently" by Mr. Good, Ms. Perez-Brau, and Cendant in-house counsel Richard Meisner that they "felt confident that Mr. Anderson would not have been asked, and was not asked, to sell franchises." St. at ¶ 62. This information was not contained in the original July 16, 2004 denial letter – indeed, Mr. Meisner's name was first communicated to Mr. Anderson in the September 20, 2004 letter. *Id*. By withholding from Mr. Anderson the evidence on which it had relied, the Administrator deprived him of the opportunity to rebut that evidence in his appeal – or to highlight the many respects in which the evidence on which the Administrator purportedly relied did not support its conclusions.

Third, in conducting a "full and fair review" of the denial of a claim, a plan administrator must "consider the evidence presented by both parties prior to reaching and rendering his decision." *Crocco*, 956 F. Supp. at 139. *See also Waksman v. IBM Separation Allowance Plan*, 138 Fed. Appx. 370, 371 (2d Cir. 2005) ("We have implicitly adopted the position that [the "full and fair review"] provision [of ERISA, 29 U.S.C. § 1133(2)] requires the administrator to consider all pertinent evidence reasonably available to her"). The Administrator did not do so – including issues specifically raised in Mr. Anderson's appeal.

For example, Mr. Anderson specifically asked to the Administrator to consider the credibility of the Cendant witnesses and the weight to give their statements, given Cendant's and Sotheby's ongoing dispute about who had to pay in the event Mr. Anderson was awarded severance benefits and Cendant's stated commitment to assist Sotheby's in "defending" the claim. St. at ¶ 59. The Administrator refused to consider these points. St. at ¶ 62. Likewise, Mr. Anderson specifically requested that the Administrator interview his counterpart at SIR and Cendant, George Ballantyne, who was a witness to many statements made by Cendant executives to Mr. Anderson concerning the scope of the duties that the former SIR Regional Managers would be expected to perform at Cendant.[6] St. at ¶¶ 53, 59. The Administrator refused to consider this corroborating evidence. St. at ¶ 62. Finally, there is no evidence in the record produced by the Administrator that it considered or discussed Mr. Anderson's September 13 and September 16, 2004 submissions or the critical issues he raised in them. St. at ¶ 60.[7] Likewise, he was unequivocally promised on September 15, 2004, that the Administrator would "discuss" the *Dabertin* case, but the Administrator never met again to do so. St. at ¶ 58.

Fourth, "[i]f the fiduciary allows third parties to appear personally, the same privilege must be extended to the participant." *Grossmuller*, 715 F.3d at 858. (emphasis added) Although the Cendant witnesses were interviewed personally, Mr. Anderson was not. Indeed, the Administrator supposedly relied on its sense of the Cendant executives' credibility due to their "in person, face-to-face" interviews, noting that the "interviewees appeared unguarded, comfortable, and answered all questions posed to them." St. at ¶ 62. ERISA's "full and fair review" obligation requires an Administrator that personally interviews third parties to extend the same opportunity to the claimant. *Crocco*, 956 F. Supp. at 139. *See also Chan v. Hartford Life Ins. Co.*, 02 Civ. 2943 (LMM), 2004 U.S. Dist. LEXIS 17962, at *28 (S.D.N.Y. Sept. 8, 2004) *(*applying arbitrary and capricious standard and citing the failure to conduct "an in person evaluation" as "other evidence in Hartford's records that calls into question its decision to terminate. . . benefits"). *Cf. Kirk v. Readers Digest Ass'n, Inc. Severance Plan*, 57 Fed. Appx. 20, 23 (2d Cir. 2003) (noting, in affirming denial of benefits under arbitrary and capricious standard, that "the Plan Administrator conducted a thorough investigation that included interviewing the relevant individuals," *including the claimant* and third parties). (emphasis added).

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[6] Mr. Anderson presented the Administrator with, among other things, Mr. Ballantyne's *uncontradicted* March 22, 2004 statement that Mr. Good "confirmed. . . that his role would be in franchise operations, but offered no specific details other than to indicate that his new job responsibility would be to assist with the sale of the Cendant/SIR franchise to SIR former affiliates or new brokers." St. at ¶ 53.

[7] The Appeal Denial (written by Ms. Wahle) refers to the September 16, 2004 letter, but there is no record that the Committee reviewed or discussed it. Unbeknownst to Mr. Anderson, they had met for the last time two days before it was sent. St. at ¶¶ 57-58.

2. The Administrator failed to follow ERISA's regulations.

ERISA's implementing regulations require that an Administrator include in the notification of the denial of a claim, *inter alia*, "(iii) A description of any additional material or information necessary for the claimant to perfect the claim and an explanation of why such material or information is necessary." Rules & Regulations for Administration & Enforcement, 29 C.F.R. § 2560.503-1(g). Indeed, the Plan's Claims Procedure itself states "the notice [of denial] will tell you what if anything you can do to have your claim approved." St. at ¶ 20. The Administrator never informed Mr. Anderson of what was needed to perfect his claim. *See Cook*, 2004 U.S. Dist. LEXIS 1259, at *22 (reversing administrator's denial of claim as arbitrary and capricious and noting that "Neither the number of opportunities defendant gave her for her appeal nor the purported independence of its doctors is relevant to the issue of whether plaintiff was ever provided with information sufficient to afford her a meaningful opportunity to perfect her claim. A plan administrator may provide a claimant with endless reviews by independent specialists, but unless the claimant is informed of the claim's defects, she is likely to be no better off than she was when she first applied.").[8]

The Appeal Denial faults Mr. Anderson for failing to provide certain evidence to the Administrator. For example:

- "Mr. Anderson failed to state ways in which his responsibilities changed in the period February 17 through March 31, [2004]."
- "Other than Mr. Good, no other Cendant representative was identified by [Mr. Anderson] who had 'not disagreed' with [Mr. Anderson's statement that he had not been offered comparable employment by Cendant."[9]
- "You did not dispute any element of our analysis of this proposed compensation model [other than relating to the $800,000 retention bonus]."[10]

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[8] Although the Second Circuit has overlooked technical violations of ERISA's notification requirements if the Plan has been in "substantial compliance" with the regulations, the existence of "substantial compliance" is "determined in light of the core requirements of a full and fair review, which include 'knowing what evidence the decision-maker relied upon, having an opportunity to address the accuracy and reliability of that evidence, and having the decision-maker consider the evidence presented by both parties prior to reaching and rendering his decision.'" *Cook*, 2004 U.S. Dist. Lexis 1259, at *21 (citing *Brown v. Retirement Comm. of Briggs & Stratton Retirement Plan*, 797 F.2d 521, 534 (7th Cir. 1986)). As noted above, none of these core requirements were met in Mr. Anderson's case. Mr. Anderson did not know what evidence the Administrator relied upon, because the Administrator withheld the interview notes from him. Having never seen that evidence, Mr. Anderson lacked the opportunity to address its accuracy and reliability. Moreover, when Mr. Anderson did raise evidence, such as credibility concerns about the Cendant employees' account of events, the Administrator did not even consider that evidence.

[9] This statement, of course, overlooks Mr. Anderson's sworn description of Mr. Siegel's comments that the role at Cendant would be a "dramatic" change. St. at ¶ 26.

[10] This statement ignores Mr. Anderson's lengthy analysis of the compensation proposal in his Declaration. St. at ¶ 29.

St. at ¶ 62. None of these supposed failings were conveyed to Mr. Anderson prior to the Appeal Denial, however, and he had no opportunity to provide the additional evidence or explanations that would have remedied these perceived deficiencies and perfected his claim.

Finally, the Administrator apparently developed and applied an unidentified "enhanced procedure" for the consideration of Mr. Anderson's claim, but never put them in writing or advised him of them. St. at ¶ 21. This failure is a direct violation of the applicable regulations. 29 C.F.R. § 2560.503-1(b)(2). ("The claims procedures for a plan will be deemed reasonably only if. . . a description of all claims procedures. . . is included as a part of a summary plan description meeting the regulations of 29 C.F.R. § 2520.102-3."). For these reasons, the Administrator's determination was arbitrary and capricious and should be reversed.

D. The Administrator's Denial Was Erroneous as a Matter of Law.

An Administrator's denial may also be found arbitrary and capricious if it is "erroneous as a matter of law." *Pagan v. Nynex Pension Plan & Nynex Corp.*, 52 F.3d 438, 442 (2d Cir. 1995). Mr. Anderson provided substantial case law to the Administrator supporting his claim that the position offered him by Cendant was not comparable to his former position at SIR. St. at ¶ 23. Mr. Anderson's May 10, 2004 submission, for example, discussed *Yochum v. Barnett Banks, Inc. Severance Pay Plan*, 234 F.3d 541, 546 (11th Cir. 2000), which found a denial of severance arbitrary and capricious under the Plan's "equivalent compensation and benefits" standard because the new job offered the claimant had a "salary and benefits package [that] would have decreased after one year" – just as the compensation proposal Cendant offered decreased significantly in value over time. Mr. Anderson also cited *Frieberg v. First Union Bank of Del.*, Civ. A. No. 99-571-JJF, 2001 U.S. Dist. LEXIS 10365, at *23 (D. Del. July 18, 2001), which held that "a future salary reduction that …was guaranteed to occur … does not comport with the definitions of 'comparable position' and 'comparable compensation level.'" In addition, Mr. Anderson cited *Ressler v. Aetna U.S. Healthcare, Inc.*, 180 F. Supp. 2d 660, 667-68 (E.D. Pa. 2001), which held that a denial of severance was arbitrary and capricious because the offer of "comparable employment" failed to "provide sufficient detail concerning the terms and conditions of the new position from which the Appeals Committee can compare the new position to the former one." In this case, the Chair of the Committee which administered the claim described the Cendant offer as "generic ideas" and "good intentions," which is far short of a specific offer which the Administrator could evaluate for comparability. St. at ¶ 35. Finally, on June 28, 2004, Mr. Anderson submitted the *Dabertin* decision, which held that it was arbitrary and capricious for an administrator to find "comparable" a position that substituted new duties for old ones.

The Administrator did not address (nor is there any record it considered) any of this legal authority. In addition, the Administrator provided no case law supporting its denials and, at its meetings, discussed no specific cases relevant to an interpretation of the word "comparable."[11]

For all of those reasons, the Court should reverse the Administrator's denial and award severance benefits to Mr. Anderson equal to twenty-four months of base salary and bonus and the value of eighteen months of benefits continuation.[12]

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[11]The ambiguous nature of the word "comparable" does not help the Administrator. It is well-settled that "any ambiguities in the plan language must be construed against the administrator and in favor of the party seeking judicial review." *Cook*, 2004 U.S. Dist. LEXIS 1259, at *3 (citing *Fay v. Oxford Health Plan*, 287 F.3d 96, 104 (2d Cir. 2002)); *Rubio v. Chock Full O'Nuts Corp.*, 254 F. Supp. 2d 413, 427 (S.D.N.Y. 2003) (granting employee class motion for summary judgment on severance claims under ERISA and holding "any ambiguities in an ERISA plan must be construed against the employer, as the drafter of the disputed document").

[12] The Second Circuit has held that "where the difficulty is not that the administrative record was incomplete, but that a denial of benefits based on the record was unreasonable," denials overturned as arbitrary and capricious should not be remanded to the plan administrator.

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E. Mr. Anderson Is Entitled to Summary Judgment on his Claims for Compensation for His Work for SIR in 2004.

Mr. Anderson has also brought claims for his bonus earned at SIR for the period January 1, 2004, through his termination on February 17, 2004, under theories of breach of contract or, alternatively, quantum merit (Counts III and IV).

Mr. Anderson had a contractual right to a bonus. Mr. Anderson's compensation at SIR consisted primarily of a base salary of $150,000 and a non-discretionary formula based cash bonus, which comprised the bulk of his compensation. Mr. Anderson's bonus at SIR for the years 2001 through 2003, for example, ranged from over $646,000 to over $727,000 per year. St. at ¶ 28. Mr. Anderson's bonus was established each year by applying a set percentage (36.3%) of all income, less expenses, derived from the pretax profit of his regions.[13] This profit was derived in significant part from his personal realtor activities and his promotion of SIR's luxury services to property owners. St. at ¶ 68. He received an annual letter from SIR reaffirming this 36.3% formula. The only reason he did not receive a similar letter in 2004, according to the President of SIR, was that "we just did not get to it. . . There was no time to think about it." St. at ¶ 65. He should have, therefore, been paid his bonus through the date SIR was sold, based upon this longstanding agreement.

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Zuckerbrod v. Phoenix Mut. Life Ins. Co., 78 F.3d 46, 51 n.4 (2d Cir. 1996). *See also Patterson v. Ret. & Pension Plan*, 00 Civ. 5962, 2001 U.S. Dist. LEXIS 15949 (S.D.N.Y. Oct. 5, 2001) (granting plaintiff's motion for partial summary judgment for severance under arbitrary and capricious standard).

[13] He also received a bonus based upon 5% of the actual pretax profits of SIR's Greenwich brokerage that exceeded the prior year's profits.

Alternatively, he is entitled to the bonus under a theory of quantum meruit. "In order to recover in quantum meruit, New York law requires the claimant to establish '(1) the performance of services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services.'" *Longo v. Shore & Reich, Ltd.*, 25 F.3d 94, 98 (2d Cir. 1994) (employee was entitled to quantum meruit recovery for the three months of services provided to her employer). Indeed, "[i]n the absence of a contract that has become effective, [an employee] is entitled to a quantum meruit recovery even though she was an at-will employee." *Id.* Likewise, "[u]nless the nature of the relationship between the parties indicates otherwise, the performance and acceptance of services gives rise to the inference of an implied contract to pay for the reasonable value of such services." *Thayer v. Dial Indus. Sales, Inc.*, 189 F. Supp. 2d 81, 91 (S.D.N.Y. 2002) (awarding quantum meruit recovery to employee for 2 and a half months of performance) (internal citation and quotation marks omitted). *See also Tappe v. Alliance Capital Mgmt. LP*, 177 F. Supp. 2d 176, 186 (S.D.N.Y. 2001) (denying motion to dismiss quantum meruit claim for a bonus where the employee "generated substantial revenue for [the employer] on the expectation of receiving a salary as well as a bonus that was significantly more valuable that [sic] his salary. Indeed, [the employee's] annual bonus had comprised the majority of his yearly compensation in recent years.").

The undisputed evidence in this case supports quantum merit recovery by Mr. Anderson of his bonus. Mr. Anderson performed services for SIR from January 1, 2004, through February 17, 2004, in good faith, and as he had for many years. SIR accepted those services, and according to Mr. Siegel, derived income from all properties that closed or went under contract during that period. St. at ¶ 69. There was no reason Mr. Anderson would have expected *not* to be compensated. Indeed, Mr. Siegel's concession that the only reason he did not receive a formal letter was that Mr. Siegel did not "think about it" confirms that SIR had not intended to change the longstanding bonus formula. Finally, the value of the services is undisputed.[14]

Mr. Anderson is also entitled to both liquidated damages and reasonable legal fees under the New York Labor Law, which provides that in any action on a wage claim in which the employee prevails, the court shall allow reasonable attorneys' fees as well as liquidated damages of 25% of the total amount of wages due (Count VI). Mr. Anderson's non-discretionary formula-based bonus is a "wage" under that statute.[15] The Second Circuit has held that where compensation "was guaranteed under the Percentage Bonus formula to be a percentage of the revenue he generated and not left to [the employer's] discretion. . . [the] Percentage Bonus falls squarely within the definition of 'commission' that is expressly included within the Labor Law's definition of 'wages.'" *Reilly v. NatWest Markets Group, Inc.*, 181 F.3d 253, 265 (2d Cir. 1999) (affirming trial courts award of liquidated damages because his bonus constituted wages under the statute).[16]

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[14] Mr. Anderson's regions achieved $744,225 in revenues from listings that had closed or had signed contracts between January 1, 2004 and February 17, 2004. St. at ¶ 67. Mr. Anderson prepared the annual budgets for his regions, and expenses regularly amounted to approximately twenty-five percent. St. at ¶ 70. As a result, he is owed a bonus of $202,618.98.

[15] The term "wages" as defined by the Labor Law § 190(i) includes "the earnings of an employee for labor or services rendered, regardless of whether the amount of earnings is determined on a time, piece, commission or other basis."

[16] *See also Ladau v. Hillier Group, Inc.*, No. 02 Civ. 4703, 2004 U.S. Dist. LEXIS 5335 (S.D.N.Y. March 30, 2004) (denying former employer's motion for summary judgment for incentive bonus under the New York Wage Law); *Simas v. Merrill Corp.*, 02 Civ. 4400 (RCC) 2004 U.S. Dist. LEXIS 1415, at * 19 (S.D.N.Y. Jan. 29, 2004) (granting former employee's motion for summary judgment for bonus because it "was clearly tied to the individual employee's performance and did not involve management discretion."); *Fiorenti v. Cent. Emergency Physicians*, 723 N.Y.S. 2d 851, 855 (N.Y. Sup. Ct. 2001) (denying motion to dismiss claim for bonus and holding that "a compensation scheme which is predicated upon an

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In this case, the formula-based bonus was based almost entirely on Mr. Anderson's personal real estate services and his promotion of SIR's luxury services to property owners in his regions. There was no discretion on SIR's part whatsoever. As a result, he is entitled to liquidated damages of 25% of his 2004 bonus and his reasonable legal fees incurred in obtaining it.

III. CONCLUSION

For the reasons stated above, Mr. Anderson requests that the Court reverse the Administrator's denial his benefits claim as arbitrary and capricious; and award him severance benefits pursuant to the Plan, prejudgment interest under ERISA, his compensation from Sotheby's for his work for SIR in 2004, liquidated damages and reasonable legal expenses under ERISA and the New York Labor Law.

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employee's personal productivity and the objective success of the venture – not the employer's discretion or any subjective standard – is a contractual right of the employee"). These cases stand in stark contrast to *Truelove v. Northeast Capital & Advisory Inc.*, 702 N.Y. S.2d 147, 149 (N.Y. App. Div. 2000) in which the plaintiff's bonus was not tied at all to personal productivity and his share of the bonus pool was entirely discretionary and subject to the non-reviewable determination of his employer.

Date: January 31, 2006

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of January, 2006, a copy of the foregoing Plaintiff's Motion for Summary Judgment, supporting Memorandum of Law, Declaration of Julia Judish, Declaration of Thomas Anderson, accompanying exhibits, and Local Rule 56.1 Statement of Undisputed Material Facts were filed electronically and served via first-class postage-prepaid, U.S. mail, on the following counsel of record for Defendants:

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